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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 9

NACIREMA OPERATING CO., INC., ET AL.,
Petitioners

v.

WILLIAM H. JOHNSON, ET AL., *Respondents*

No. 16

JOHN P. TRAYNOR and JERRY C. OOSTING,
DEPUTY COMMISSIONERS,
Petitioners

v.

WILLIAM H. JOHNSON, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF ON BEHALF OF THE NATIONAL MARITIME COMPENSATION COMMITTEE AS AMICUS CURIAE

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IN THE

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v.
WILLIAM H. JOHNSON, ET AL., *Respondents*

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JOHN P. TRAYNOR and JERRY C. OOSTING,
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Petitioners
v.
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF ON BEHALF OF THE NATIONAL MARITIME COMPENSATION COMMITTEE AS AMICUS CURIAE

TO THE HONORABLE JUDGES OF SAID COURT:

CONSENT OF PARTIES

All of the parties in these causes have given their written consent to the filing of this Brief Amicus Curiae and such written consent has been filed with the Clerk.

STATEMENT OF INTEREST

The National Maritime Compensation Committee is a nationwide organization whose membership is composed of representatives of the following twenty maritime associations from substantially all of the maritime centers in the United States:

American Merchant Marine Institute, Inc.
Boston Shipping Association, Inc.
Great Lakes Terminal Association
Hampton Roads Maritime Association, Inc.
Lake Carriers Association
Master Contracting Stevedores Association of the Pacific Coast, Inc.
Mobile Steamship Association, Inc.
National Association of Stevedores
New Orleans Steamship Association
New York Shipping Association, Inc.
North Atlantic Ports Association
Pacific American Steamship Association
Pensacola Steamship Association
Philadelphia Marine Trade Association
Portland Shipping Association, Inc.
Savannah Maritime Association
Steamship Trade Association of Baltimore, Inc.
Tampa Steamship Association
United States Great Lakes Shipping Association
West Gulf Maritime Association

In turn the membership of these maritime associations include substantially all of the different types of employers whose employees come within the jurisdiction of the Longshoremen's Act.

The National Maritime Compensation Committee was formed by these employer groups as a means of making known, primarily to the Congress, the views of substantially all segments of the maritime industry in connection with legislation relating to the compensation of their employees who are injured in the course of their employment.[1]

While not contemplated when the National Maritime Compensation Committee was initially formed, it is a particularly appropriate organization to file this Amicus Curiae Brief in order to acquaint this Court with the views of the employers in substantially all segments of the maritime industry as a whole.[2]

Notwithstanding this Court's repeated holdings that jurisdiction under the Longshoremen's Act existed only when the situs of the injury was "upon the navigable waters of the United States" as the Longshoremen's Act expressly provides, and notwithstanding two decisions of the Court of Appeals for the Fifth Circuit in 1967,[3] one

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1. The National Maritime Compensation Committee is registered pursuant to the Federal Regulation of Lobbying Act.

2. The Court's records will reflect that a Brief Amici Curiae was filed in support of the granting of the Petition for a Writ of Certiorari by eight maritime employer associations, all of whom are members of the National Maritime Compensation Committee. Under the circumstances, it was felt that no separate brief on their behalf needed to be filed. The associations that filed the Brief Amici Curiae in support of the Petition have not, therefore, lost their interest or concern about the outcome of these cases, but are among those who are participating in the present brief as members of the National Maritime Compensation Committee.

3. *Travelers Insurance Co. v. Shea*, 5 Cir. 1967, 382 F.2d 344, cert. den. 389 U.S. 1050, 19 L.Ed.2d 843, 88 S.Ct. 780 (1968) Motion for Leave to File Late Petition for Rehearing denied, Oct. 14, 1968 and *Nicholson v. Calbeck*, 5 Cir. 1968, 385 F.2d 221, cert. den. 389 U.S. 1051, 19 L.Ed.2d 843, 88 S.Ct. 790 (1968), Motion for Leave to File Late Petition for Rehearing denied, October 14, 1968.

decision from the Court of Appeals for the Ninth Circuit in 1967,[4] and a decision of the Court of Appeals for the Second Circuit in 1965[5] all of which followed this Court's earlier decisions by expressly holding that when the situs of the injury was on the dock the jurisdiction of the Longshoremen's Act did not extend to it, the Court of Appeals for the Fourth Circuit below has held in these cases that jurisdiction under the Longshoremen's Act is not to be determined on the basis of the "situs" of the injury on navigable waters, but rather on the basis of the maritime function or status of the employee at the time of his injury without regard to its "situs" whether ashore or afloat.

In so doing it is respectfully submitted that the Court of Appeals below was clearly wrong, that its decision attempting to create an entirely new "status test" for determining jurisdiction under the Longshoremen's Act should again be rejected by this Court, and that this Court should reaffirm its prior decisions which hold that the Congressional "situs test" is to be used in determining whether jurisdiction over a particular injury falls within the Longshoremen's Act or within the purview of a state workmen's compensation act.

SUMMARY OF ARGUMENT

1.

Jurisdiction under the Longshoremen's Act has always been based, as Congress expressly provided, on the "situs" of the injury, and not on the "status" or function of the

4. *Houser v. O'Leary*, 9 Cir. 1967, 383 F.2d 730, cert. den. 390 U.S. 954, 19 L.Ed.2d 1147, 88 S.Ct. 1047 (1968), Motion for Leave to File Late Petition for Rehearing denied, October 14, 1968.

5. *Michigan Mutual Liability Co. v. Arrien*, 2 Cir. 1965, 344 F.2d 640, cert. den. 382 U.S. 835, 15 L.Ed.2d 78, 86 S.Ct. 80 (1965).

employee at the time of injury. In holding that the employee's "status" or function as a maritime worker was determinative of jurisdiction between the state and federal compensation remedies, the Court of Appeals below completely discarded this Court's unequivocal holding directly to the contrary in 1962 in the *Calbeck* case.[6]

2.

The Congressional "situs test" and not the Fourth Circuit "status test" has also always been applied to those employees who do not fall within the usual concept of "longshoremen" or "shipyard workers", but who are better described as "harbor workers" for whom the Longshoremen's & Harbor Workers' Compensation Act was also passed. First in *Nogueira* in 1929 and again in *O'Rourke* in 1953, this Court held that the "situs" of a railroad employee's injury upon navigable waters gave exclusive jurisdiction to the Longshoremen's Act to the exclusion of the Federal Employers' Liability Act covering railroad workers and whether his "status" was that of a railroad worker or a maritime employee was of no significance.[7]

3.

The constitutional line of jurisdiction between the Longshoremen's Act and the state compensation acts has been clearly defined over the last 40 years under the Congressional "situs test". It is simple and easy to apply:

1. Situs of injury upon navigable waters—Longshoremen's Act applies.
2. Situs of injury on land or extension thereof, such as a dock—State Act applies.

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6. See full discussion, *infra*, pages 8 to 11.

7. See full discussion, *infra*, pages 11 to 13.

The recent litigation in this area has not resulted from the inability of the Courts to apply the Congressional "situs test", but rather from the attempts, such as those, in these cases, by some employees and their attorneys to get the courts to amend the jurisdictional requirements of the Longshoremen's Act from the Congressional "situs test" to a "status test".[8]

4.

If the "status test" of the Court of Appeals below is adopted, many serious and difficult constitutional questions arise as a new constitutional line of jurisdiction will have to be drawn by the courts in determining how far ashore the admiralty and maritime jurisdiction of the United States can be constitutionally extended. This constitutional line will be even more difficult to draw based on "status" than it has been based on "situs" and will create chaos and "uncertainty as to the source, state or federal" of an employee's compensation remedy, the very uncertainty this Court abhorred and condemned in *Calbeck*.[9]

5.

A change from the Congressional "situs test" to the Fourth Circuit "status test" will result in much controversy which can be resolved only in administrative and judicial adversary proceedings. The employer will have to file reports of injury under both the federal and state acts and cannot safely start the payment of compensation until the employee's "status" has been determined and even such a determination by a court is not conclusive unless

8. See full discussion, *infra*, pages 13 to 15.

9. See full discussion, *infra*, pages 15 to 19.

that court had some jurisdiction in the first place. Such a test thus destroys the self executing provisions of the Longshoremen's Act and denies the employee the rapid and speedy determination of the compensation benefits which is one of the socially desirable purposes of the Longshoremen's Act.[10]

6.

If there is to be a change from the Congressional "situs test" of jurisdiction to the Fourth Circuit "status test" or to some other test which some may think is more appropriate, this change should be made by the Congress and not by the courts by judicial interpretation as this Court specifically held in *Pillsbury* which involved a different section of the Longshoremen's Act. This is particularly true where no suggestion has ever been made to or by the Congress that this Court's application of the Congressional "situs test" is undesirable or wrong even though Congress has amended various sections of the Longshoremen's Act on six different occasions since it was first enacted in 1927, an average of once every 5 or 6 years, and had under consideration in 1967 and 1968 in the 90th Congress extensive proposed revisions to 11 of the 50 sections of the Act. This Congressional silence clearly demonstrates that "situs" and not "status" is the jurisdictional test which Congress originally intended and still wants to have applied to the Longshoremen's Act.[11]

10. See full discussion, *infra*, pages 19 to 23.

11. See full discussion, *infra*, pages 23 to 28.

ARGUMENT

Jurisdiction of Longshoremen's Act Has Always Been Based on SITUS and Not on STATUS

By relying substantially on two brief sentences (Appendix, pages 49-50) from this Court's opinion in *Calbeck*,[12] which are taken out of context and misconstrued,[13] and then completely ignoring the categorical and unequivocal statements directly to the contrary by this Court in no less than four places in *Calbeck*,[14] the Court of Appeals below in these cases arrived at an incredible and shocking conclusion. It concluded that when the Congress refused to describe the jurisdiction of the Longshoremen's Act in Section 3(a) as extending to injuries and deaths occurring

> "within the admiralty jurisdiction of the United States."[15]

and instead deliberately chose to describe the jurisdiction of the Act as extending only to injuries and deaths occurring

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12. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 at 130, 8 L.Ed.2d 368, at 378, 82 S.Ct. 1196 (1962).

13. These two sentences are but only a small part of a quotation from a 1944 decision of the Court of Appeals for the Fifth Circuit in *DeBardeleben Coal Corp. v. Henderson*, 5 Cir. 1944, 142 F.2d 481, at 483.

14. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 at 117, 120, 124 and 126, 8 L.Ed.2d 368, at 371, 373, 375, and 376, 82 S.Ct. 1196 (1962).

15. The Longshoremen's Act as initially submitted to Congress by the Department of Labor proposed that this language be used to describe how far jurisdiction under the Longshoremen's Act was to extend. See Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., page 2.

"upon the navigable waters of the United States"[16]

that the Congress did not really mean what it said, but rather intended for the jurisdiction of the Act to extend to all injuries and deaths occurring

> "within the admiralty jurisdiction of the United States" and whether they occurred "upon the navigable waters of the United States" or not was of no significance whatsoever!

In reaching this conclusion the Court of Appeals below even more shockingly surmised that this Court had arrived at this same incredible conclusion in *Calbeck*. In order to so conclude, the Court of Appeals below completely disregarded what can only be described as the very "heart" of this Court's decision in *Calbeck:*

> "In sum, it appears that the Longshoremen's Act was designed
>
> (1) to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters,
>
> and
>
> (2) to avoid uncertainty as to the source, state or federal, of that remedy.

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16. This is the language used to describe the extent of the Longshoremen's Act jurisdiction as passed by the Congress. 33 U.S.C.A. §903(a). As the parenthetical expression "including any drydock" which follows these words in the Act is not involved here, it is not necessary to consider these words in these cases except to the extent that having expressly described the only type of dock—a drydock—to which the Longshoremen's Act was to extend, it is reasonable to assume that had Congress intended the jurisdiction of the Longshoremen's Act to extend to all docks they would not have confined it to a specific type of dock which itself was included only because it was upon the navigable waters of the United States.

> Section 3(a) should, then, be construed to achieve these purposes."[17]

If the decision of the Court of Appeals below in these cases is permitted to stand,—that Congress intended the jurisdiction of the Longshoremen's Act to be "status oriented" rather than "situs oriented"—then the Congressional design—to ensure a compensation remedy for all injuries sustained upon navigable waters and to avoid uncertainty as to the source of that remedy, state or federal,—will once again be enshrouded in a fog of confusion and chaos. And this Court, after more than 40 years in which it has consistently held that jurisdiction under the Longshoremen's Act is to be determined by the Congressional "situs test", will have to embark together with its brethren of the lower Federal courts upon a completely new judicial voyage in which an attempt is made to determine what workers injured on land or extensions thereof meet the Fourth Circuit "status test" as employees "within the admiralty jurisdiction of the United States" and thus fall within the jurisdiction of the Longshoremen's Act.

For the Court of Appeals below to conclude that jurisdiction under the Longshoremen's Act is to be based on an employee's "function" or "status" rather than the "situs" of his injury after nearly 40 years of judicial decisions to the contrary in which as fine and definite a line between state and federal compensation jurisdiction has been drawn

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17. In the vernacular of the "men who go down to the sea in ships," this would probably be referred to as the "guts" of this Court's decision. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 at 124, 8 L.Ed.2d 368, at 375, 82 S.Ct. 1196. These two sentences have been set out in this form in this brief for emphasis and do not appear in the Court's opinion in this precise format, but only the parenthetical numbers 1 and 2 have been added, likewise for emphasis.

as it is humanly possible to do, is not only startling but shocking in its implications. Although the two sentences relied on by the Court of Appeals below from this Court's decision in *Calbeck's* may be so twisted and distorted as has been done beyond all rhyme or reason, the National Maritime Compensation Committee respectfully submits that this Court's actual decision in *Calbeck* cannot be so cavalierly disregarded no matter how appealing or strong may be the desire to permit those who have suffered injury to select whichever compensation remedy they may desire.

Situs Not Status Determines Harbor Worker's Remedy Too

As previously indicated, this Court has always held, in cases involving injuries to true longshoremen, those engaged in loading or unloading a vessel, such as are involved in these cases, and as to shipyard workers, that the Congressional "situs test" and not the Fourth Circuit "status test" is to be used in determining jurisdiction as between the federal and state compensation acts. That this Congressional "situs test" is the one to be used in determining whether an employee's injury occurs within the jurisdiction of the Longshoremen's Act has been made even more clear in those cases in which injuries have been sustained by employees who do not fall within the normal concept of a "longshoreman", or "shipyard worker" but rather are better described as "harbor workers" for whose benefit the Longshoremen's & Harbor Workers' Compensation Act was also passed.

One of the most recent of these "harbor worker" cases

from this Court is the *O'Rourke* case[18] which involved an injury to a railroad brakeman while he was assisting in moving loaded railroad cars from a car float upon navigable waters onto the railroad tracks ashore. *O'Rourke* was a suit under the Federal Employers' Liability Act which provides the remedy available to railroad employees who are injured in the course of their employment.[19]

The Court of Appeals for the Second Circuit had held that as O'Rourke was engaged in railroad work on navigable waters, he was entitled to a railroad employee's remedy under the Federal Employers' Liability Act. Thus, the Second Circuit held that because of O'Rourke's "status" as a railroad employee, the "situs" of his injury upon the navigable waters of the United States was of no consequence or significance.[20] In reversing this "status test" of jurisdiction by the Second Circuit, this Court categorically held in *O'Rourke* that the "situs" of his injury upon navigable waters was determinative of the jurisdictional question between the Longshoremen's Act and the Federal Employers' Liability Act, and that what his "status" might be as a "maritime employee" or a "railroad employee" was of no consequence or significance:

> ". . . If, then, the accident occurs on navigable waters, the (Longshoremen's) Act must apply . . . irrespective of whether he himself (the employee) can be labeled 'maritime'." (Parenthetical expressions added)[21]

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18. *Pennsylvania Railroad Co. v. O'Rourke,* 344 U.S. 334, 97 L.Ed. 367, 73 S.Ct. 302 (1953).

19. 45 U.S.C.A., §51.

20. 194 F.2d 612.

21. *Pennsylvania Railroad Co. v. O'Rourke,* 344 U.S. 334, at 341, 97 L.Ed. 367, at 374, 73 S.Ct. 302 (1953).

A more categorical and unequivocal rejection of the contention that jurisdiction under the Longshoremen's Act is to be determined by the "status test" and not by the Congressional "situs test" as the Court of Appeals below held in these cases cannot be imagined. In *O'Rourke*, this Court simply reiterated its holding some 24 years earlier in 1929 in *Nogueira*,[22] only two years after the Longshoremen's Act was passed—that the "situs" of the injury upon navigable waters gave exclusive jurisdiction over O'Rourke's injury to the Longshoremen's Act to the complete exclusion of any and all other statutes. And this even though O'Rourke clearly met the "status test" of a railroad brakeman who was performing precisely the duties that any railroad brakeman would perform whether ashore or afloat at the time of his injury.

Congressional Situs Test Is Simple and Easy to Apply

Perhaps it is the simplicity of the Congressional "situs test" which created the problems for the Court of Appeals below. The extent to which that Court obviously has strained in its efforts to rationalize and justify its disregard of nearly 40 years of the judicial application of the Congressional "situs test", perhaps illustrates better than anything else the chaos that will result if the Fourth Circuit "status test" becomes the basis of Longshoremen's Act jurisdiction rather than the very simple Congressional "situs test" which is now so clearly defined. The Congressional "situs test" is so simple and so self executing in substantially all cases that it completely "avoids uncertainty as to the source, state or federal," of the employee's

22. *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 74 L.Ed. 754, 50 S.Ct. 303 (1930).

compensation remedy, the very uncertainty which this Court abhorred and expressly condemned in *Calbeck*.[23]

With the Congressional "situs test" determination of the source of the employee's remedy, whether state or federal, is simple indeed:

1. If the situs of the injury is on the navigable waters of the United States, the federal Longshoremen's Act applies.
2. If the situs of the injury is upon the land or any extension thereof, such as a dock, the state act applies.

This simple test leaves possible jurisdictional questions to arise only in the very few cases which occur at the borderline of the navigable waters of the United States and the edge of the land or dock.

It has not been the inability of the Courts to apply the Congressional "situs test" in determining jurisdiction between the federal and state compensation remedies which has produced the litigation in this area in recent years. Rather, it has been the attempts by various longshoremen and harbor workers to try to get the courts to amend the jurisdictional requirements of the Longshoremen's Act from the Congressional "situs test" to a "status test" which has produced this litigation.

Since *O'Rourke* only the Court of Appeals below has been willing to so amend Section 3(a) of the Act and to ignore the consistent application of the "situs test" by this Court by advocating its own, and what will undoubtedly

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23. *Calback v. Travelers Insurance Co.*, 370 U.S. 114, at 124, 8 L.Ed.2d 368, at 375, 82 S.Ct. 1196 (1962).

be chaotic, "status test". Only the unwillingness of some injured employees and their attorneys to accept the plain and unequivocal Congressional "situs test", clearly and unambiguously stated by the Congress, and repeatedly reaffirmed by this and other federal courts, has produced the recent litigation in this area.

If Status Test Adopted Serious and Difficult Constitutional Questions Arise Which Will Create Chaos and Endless Litigation Under the Longshoremen's Act

If the Fourth Circuit "status test" is to become the law despite its specific rejection by the Congress at the time the Longshoremen's Act was passed in 1927, the "uncertainty as to the source, state or federal" of an employee's compensation remedy which this Court abhorred and expressly condemned in *Calbeck* will become an everyday occurrence in all ports of the United States. Such a "status test" would require this and other federal courts to embark upon a new voyage in which many difficult and complicated constitutional questions would have to be resolved under the facts of individual cases on a case-by-case basis. While not all inclusive, a few of the difficult constitutional questions which will produce this chaos and confusion where certainty is so sorely needed are:

1. Since the Fourth Circuit "status test" is based on the extent to which the admiralty and maritime jurisdiction of the United States can be constitutionally extended ashore by the Congress, how far ashore onto dry land does the admiralty and maritime jurisdiction of the United States extend? Does it extend any further than to those injuries which

are consummated on land by vessels which are situated upon navigable waters of the United States which is the test of the Admiralty Extension Act?[24]

2. Can the admiralty and maritime jurisdiction of the United States be constitutionally extended to any employee whose "status" might cause him to be engaged in maritime employment wherever he may be located, whether on the dock, or the ship or at his stevedoring company employer's office downtown, many miles removed from the navigable waters of the United States? For example, if one stevedoring company employer has its office personnel who handle its longshore payroll in an office in the warehouse on the dock, do these office personnel, who clearly are maritime employees in the sense that they work for a company engaged only in maritime operations, meet the Fourth Circuit "status test" so that they are entitled to the federal rather than the state remedy even though such employees never perform any of their work upon the navigable waters of the United States? And if so, can the Longshoremen's Act be constitutionally extended to the same type of office employee of another stevedore who has its longshore payroll office downtown, many miles removed from any navigable waters, but who also occupies the same "status" as those employees in the office at the dock?

3. Does a shipyard worker, who performs all of his services in a machine shop at the shipyard without ever going aboard a vessel on navigable waters, but all of whose employment involves the fabrication

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24. 46 U.S.C.A. §740.

of parts of machinery, plates, etc. for use in the repair of vessels on navigable waters, meet the Fourth Circuit "status test" so he is entitled to compensation under the Longshoremen's Act although he never performs any work upon the navigable waters of the United States? Or what of the watchman or the guard at the entrance gate to the shipyard, who also never has occasion to go any closer to the water's edge or to a dock of any kind than does the shipyard worker in the machine shop, does he meet the Fourth Circuit "status test" for Longshoremen's Act Compensation purposes? Even if these shipyard workers meet the Fourth Circuit "status test", can the Longshoremen's Act be constitutionally extended to them?

4. Or does the driver of a laundry truck who perhaps once or twice a week has occasion to deliver laundry to a vessel meet the Fourth Circuit "status test" sufficient to entitle him to Longshoremen's Act compensation regardless of where his injury may occur? If so, does this Longshoremen's Act jurisdiction based on the Fourth Circuit "status test" apply only on those days when his deliveries take him to a vessel or does it apply to him wherever and whenever he may be injured at any time in the course of his employment whether he has any "maritime laundry" on his truck at the time or not? If so, is such an extension constitutional?

5. What employees of a steamship agency, whose sole business is to serve as agents for vessels both foreign and domestic while they are in port meet the Fourth Circuit "status test" sufficient to bring them within Longshoremen's Act jurisdiction? Do only those

> employees of a steamship agency whose duties require them to go aboard vesels or down to the docks meet the Fourth Circuit "status test"? And if so, if they are injured in the office downtown, is their "status" such as to still entitle them to Longshoremen's Act compensation? If so, is this a proper constitutional extension of the maritime jurisdiction of the United States?

These questions are neither farfetched nor simple figments of anyone's imagination, but they are real and serious constitutional questions which the Fourth Circuit "status test" poses. And they can be resolved and settled, and a new constitutional line between the federal and state remedies can be ascertained only after years of extensive and far-flung litigation. We respectfully submit that the Court of Appeals below jumps much too far and much too fast over serious constitutional questions when it states "Beyond question, Congress could constitutionally ground jurisdiction on the function or status of the employe, . . . and thus extend coverage to all longshoremen injured during the loading, unloading, repairing or refitting of vessels regardless of the situs of the injury." (Appendix, page 48) As the foregoing questions graphically demonstrate, the constitutional questions are just not that simple, and determining the constitutional limits of jurisdiction of the Longshoremen's Act on the Fourth Circuit basis of "the function or status of the employee" cannot readily or easily be done. This for the simple reason that many important functions in the "loading, unloading, repairing or refitting of vessels" can be and are done by employees of stevedores, shipyards, ship suppliers, etc. whose work never requires them to go aboard a vessel or even in the vicinity of a dock or vessel,

even though their functions are as essential to the work being done for the vessel as that done by their fellow employees physically aboard the vessel or on the dock.

Any change from the Congressional "situs test" to the Fourth Circuit "status test" to determine jurisdiction under the Longshoremen's Act will produce even more litigation with even more difficult constitutional questions than those that have occurred in trying to draw the line between federal and state jurisdiction in the tidelands of the coasts of the United States with which this Court is thoroughly familiar.

Status Test Promotes Controversy, Destroys Self-Executing Provisions of Act and Delays Compensation Benefits

That an enormous amount of controversy which can be resolved only in administrative or judicial adversary proceedings would be forthcoming immediately upon any change from the Congressional "situs test" to the Fourth Circuit "status test" is perhaps best illustrated by calling the Court's attention to the fact that under the Longshoremen's Act the one year period of time in which to file a claim does not begin to run on the date of the Longshoreman's injury unless a report of the injury has been filed by the employer with the Deputy Commissioner administering the Act within ten days of the injury date. If not filed within the ten day period allowed by the Act, Section 930(f)[25] provides that the one year period of limitations provided for in Section 913(a)[26] of the Act does not begin to run against the claim of the injured em-

25. 33 U.S.C.A. §930(f).

26. 33 U.S.C.A. §913(a).

ployee until such a report of injury has been furnished to the Deputy Commissioner as required by the Act.

Thus, in order to insure that the proper remedy, state or federal, has been selected under the Fourth Circuit "status test" in connection with any injury sustained by any of his employees, any employer who meets the statutory definition in the Longshoreman's Act—that is any "employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States"[27]—must file reports of injuries on all of his employees under the Longshoremen's Act "regardless of the situs of the injury." He must likewise file a report, if the injury occurs upon land or any extension thereof, such as a dock or pier, with the state workmen's compensation act authorities.

Before the employer can safely start the payment of compensation benefits under these circumstances, under the Fourth Circuit "status test", the employee's "status" must first be ascertained or determined. As this Court indicated in the concluding part of its opinion in *Calbeck*, unless and until a judicial or administrative proceeding has been held to determine whether the employee's compensation remedy is under the federal or the state act, which of the two acts has jurisdiction remains an open questions.[28] And once this determination has been made in an administrative or judicial proceeding under either the state or federal act, it is binding and effective only if there was some basis for jurisdiction under the state or federal act. If not, the judgment of the court who rendered it would be void for lack of jurisdiction, and the

27. 33 U.S.C.A. §902(4).

28. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, at 131, 8 L.Ed.2d 368, at 379, 82 S.Ct. 1196 (1962).

employee would still be free to proceed to prosecute a claim under the other Act.[29]

Thus one of the basic and fundamental purposes of the Longshoreman's Act—to provide an almost immediate payment of compensation benefits in a substantially self-executing way without the intervention of any administrative officer or, proceeding—a purpose fully realized under the Congressional "situs test" of jurisdiction, will be completely thwarted and hopelessly bogged down in a mass of administrative and judicial proceedings.

If Section 3(a) is to be construed to achieve the Congressional purposes which this Court emphasized in *Calbeck:*

1, ". . . . to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters,

and

2. "to avoid uncertainty as to the source, state or federal, of that remedy,"[30]

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29. Not only is this clearly indicated by this Court's decision in *Calbeck*, but has been the result reached by several lower federal courts.
See:
Western Boat Building Co. v. O'Leary, 9 Cir. 1952, 198 F.2d 409;
Newport News Shipbuilding & Drydock Co. v. O'Hearne, 4 Cir. 1951, 192 F.2d 968;
Flying Tiger Lines, Inc. v. Landy, N.D. Cal. 1965, 250 F.Supp. 282; affirmed 9 Cir. 1966, 370 F.2d 46;
Globe Indemnity Co. v. Calbeck, S.D. Tex. 1959, 230 F.Supp. 9;
Gulf Oil Corporation v. O'Keefe, E.D. S.C., 1965, 242 F.Supp. 881;
Puget Sound Bridge & Drydock Company v. O'Leary, W.D. Wash. 1966, 260 F.Supp. 260.

30. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, at 124, 8 L.Ed.2d 368, at 375, 82 S.Ct. 1196 (1962).

the Congressional "situs test" must be reaffirmed and the amphibious, ambiguous Fourth Circuit "status test" in these cases must be rejected. To do otherwise is to effectively defeat, not only the above two Congressional purposes, but the additional socially desirable purpose of securing to an injured employee a rapid and speedy determination of compensation benefits under a statute that was designed to be automatic and almost completely self executing by its own terms.[31]

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31. The self executing nature of the Longshoremen's Act was summarized by now Chief Judge Brown of the Court of Appeals for the Fifth Circuit in the following language:

> "Unlike some State compensation acts, the Longshoremen's Act is almost self-executing. Compensation benefits are payable and paid, medical care and attention furnished, generally without even the necessity of filing a formal claim, as such, almost universally without a formal hearing by the Deputy Commissioner, only in a few cases does the matter proceed to formal hearing and award and even more rare is the resort to the limited judicial review. The heart of any such system is the mandatory report of an injury by the employer within 10 days under §930(a). A failure to file subjects the employer to the sanctions of civil penalties, §930(e). With this the Act moves swiftly to require affirmative action by the employer. If disability persists for the statutory minimum, payments of compensation must be commenced within 14 days, §914(b). The only thing which excuses this is a formal controversion filed by the employer, §914(d). Failure to commence and continue payment of compensation benefits and to furnish requisite medical aid, care and attention where no controversion is filed subjects the employer again to substantial sanctions, §§914(e) and (f)." *Flowers v. Travelers Insurance Company*, 5 Cir. 1958, 258 F.2d 220, at 225.

But it is not only the employer who is put in this dilemma simply because he had to make the first decision as to which is the proper remedy, for ultimately the choice must be made by the employee himself as to the act under which his claim will be processed, whether state or federal.

Any Change From Situs Test to Status Test Should Be Made By Congress

Since it was first called upon in 1929 to construe the meaning of the jurisdictional words—"upon the navigable waters of the United States"—contained in Section 3(a) of the Longshoremen's Act[32] this Court has repeatedly held that the "situs" of the injury upon navigable waters determines jurisdiction and not the "status" or function of the employee at the time of his injury. This uniform approach to the construction of this section of the Act for nearly 40 years by this Court cannot be so lightly discarded as it was by the Court of Appeals below.

Only a few years ago when this Court was asked to depart from a prior jurisdictional decision in which it had held that a civilian seaman employee of the United States government had as his only remedy for injury or death the Federal Employees Compensation Act,[33] this Court in declining to change its prior jurisdictional holding said:

> " '(W)hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.' *United States v. South Buffalo R. Co.*, 333 U.S. 771, 774, 775, 92 L.ed. 1077, 1080, 1081, 68 S.Ct. 868. If civilian seamen employed by the Government are to be accorded rights different from or greater than those which they enjoy under the Compensation Act, it is for Congress to provide them."[34]

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32. 33 U.S.C.A. §3(a).

33. 5 U.S.C.A. §8101.

34. *Patterson v. United States*, 359 U.S. 495, at 496, 3 L.Ed.2d 971, at 972, 79 S.Ct. 1293 (1959).

The Congressional "situs test" presents no constitutional questions because nothing could be clearer than that the navigable waters of the United States are squarely within the Constitutional grant of admiralty and maritime jurisdiction to the Federal government. If there is to be any change in the Congressional policy from a "situs" to a "status test", it should clearly come from Congress and not by judicial interpretation. And this is particularly true where any change to such a "status test" will present many serious and difficult constitutional questions which can be resolved only after many years of what can only be almost endless litigation.[35]

That Congress will undertake, on some occasions, at least, to rectify what it considers to be a "mistaken" interpretation of a section of the Longshoremen's Act by this Court, or to change the policy of the Act, can best be demonstrated by referring to this Court's interpretation of Section 13(a) of the Longshoremen's Act in the *Pillsbury* case.[36] Section 13(a) of the Act provides that compensation for disability is barred unless a claim is filed within one year after the injury.[37] In *Pillsbury*, it was contended that the word "injury" as used in this section of the Act should be construed to mean "disability" so that an injured employee could file a claim at any time within one year after the injury had resulted in disability. In declining to so amend the statute this Court stated in part:

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35. See prior discussion these constitutional questions, *supra*, pages 15 to 19.

36. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 96 L.Ed. 225, 72 S.Ct. 223 (1952).

37. 33 U.S.C.A. §913(a).

"We are not free, under the guise of construction, to amend the statute by inserting therein before the word 'injury' the word 'compensable' so as to make 'injury' read as if it were 'disability'. Congress knew the difference between 'disability' and 'injury' and used the words advisedly . . . . Congress meant what it said when it limited recovery to one year from date of injury, and 'injury' does not mean 'disability'.

We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation. *While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us.*"[38] (Emphasis supplied)

To meet this construction of Section 13(a) of the Act, the Department of Labor included in the extensive bills which it had introduced in both Houses of the Congress in the fall of 1967 an express provision that "the time for filing a claim shall not begin to run until the employee or his beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment."[39] Thus

38. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, at 199, 96 L.Ed. 225, at 229, 72 S.Ct. 223 (1952).

39. See Hearings on S. 2489, Sub Committee on Labor of the Senate Committee on Labor and Public Welfare, 90th Congress, 1st and 2nd Sessions, pages 9-10. The Senate bill was introduced on September 29, 1967, and an identical bill was introduced in the House of Representatives as H.R. 13314 on October 4, 1967.

when this Court has construed a section of the Longshoremen's Act in such a way that the Department of Labor, which is charged with the responsibility for administering the Act, believes either a "mistake" has been made or the policy of the Act needs to be changed, they proceed to introduce in the proper forum the necessary legislation to try to effectuate a change.

What was said by this Court in *Pillsbury* applies with even greater force to the cases presently before the Court which involve the jurisdictional section of the Act. As previously indicated, this Court has applied the Congressional "situs test" to Section 3(a) of the Act since 1929. Although the Congress has amended various sections of the Act on numerous occasions—in 1934, 1938, 1948, 1956, 1959 and 1961—not one single suggestion has ever been made that this Court's application of the Congressional "situs test" to determine the jurisdiction of the Act is undesirable or "mistaken" and that the Fourth Circuit "status test" or any other jurisdiction test should be substituted for it. Nor is there any such suggestion or proposal to depart from the Congressional "situs test" contained in the Department of Labor's comprehensive bills to amend the Longshoremen's Act introduced in both Houses of the Congress in the fall of 1967. And this even though the proposed 1967 amendments would amend 11 of the 50 sections of the Act, repeal another section and add one additional section.[40]

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40. The full text of the proposed 1967 amendments can be found on pages 3 to 21 of the Hearings on S. 2485, Sub Committee on Labor of the Senate Committee on Labor and Public Welfare, 90th Congress, 1st and 2nd Sesions. Neither the Senate Sub Committee on Labor nor the committee to which the identical 1967 amendments in H.R. 13314 were referred in the House completed their work on the proposals. Undoubtedly these same bills or revisions of them will be re-introduced in the 91st Congress either this year or next,

This Congressional silence for over 40 years during which it has considered amendments to the Longshoremen's Act on an average of once every 5 or 6 years is of no small significance as this Court once said:

> "It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depends upon the nature of the Congressional power and the effect of its exercise.[41]

Only one possible implication from the silence of Congress for over 40 years can be drawn—it fully agrees with this Court's application of its "situs test" in determining jurisdiction under Section 3(a) of the Act. And the implication is strong indeed since the nature of the Congressional power in this area is absolute under the Constitutional grant of the admiralty and maritime jurisdiction to the Federal government.

If there is to be a change from the Congressional "situs test" as aproved by this Court in determining jurisdiction under Section 3(a) of the Longshoremen's Act, either to the Fourth Circuit "status test" or to some other "test" which might be considered more appropriate, we respectfully submit it should be made only by the Congress through its careful, deliberative process where what is truly in the best interest of all concerned may best be determined.

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and it would, of course, be a simple matter for the Congress to revise the jurisdictional section of the Act if it thinks that this is necessary or desirable in connection with the re-introduction of these bills.

41. *Graves v. New York*, 306 U.S. 466, at 479, 83 L.Ed. 927, at 932, 59 S.Ct. 595.

CONCLUSION

For the foregoing reasons, the National Maritime Compensation Committee respectfully submits that the already well drawn jurisdictional line based on the "situs test" should not be replaced by the Fourth Circuit "status test", which can only produce much confusion and chaos as a new constitutional jurisdictional line is drawn on a case-by-case basis, and therefore, that the decision of the Court of Appeals below in these cases should be reversed and those of the District Courts below reinstated.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief Amicus Curiae have been served on the attorneys for all parties herein by depositing the same in a United States mail box with first class air mail postage prepaid, addressed to counsel of record at the following post office addresses on this the 21st day of January, 1969:

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